UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ZACHARY HILLER,

Plaintiffs,

-against-

SCHWARTZ & FEINSOD and NEIL SCHWARTZ and JONATHAN FEINSOD, Individually,

Defendants.

7:16-CV-05447-VB-LS

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT

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Defendants Schwartz & Feinsod, Inc. (named incorrectly in the caption of this action), Neil Schwartz and Jon Feinsod (defendants collectively are referred to as "Schwartz and Feinsod") respectfully submit this memorandum of law in opposition to plaintiff's motion for a declaratory judgment concerning the enforceability of a limitations provision contained in the arbitration section of the contract that plaintiff freely entered into with the National Football Players Association ("NFLPA").

FACTS

The facts relevant to this motion are set forth in detail in the Declaration of Neil Schwartz in Support of Defendants' Motion to Compel Arbitration (Dkt. No. 13) and the Declaration of Mario Aieta in Support of Defendants' Motion to Compel Arbitration (Dkt. No. 12) and the exhibits attached to those declarations, which are incorporated herein as part of defendants' opposition to plaintiff's motion for a declaratory judgment.

Of particular relevance to the instant motion are the following facts: Plaintiff Hiller never worked for defendants, he was never paid by defendants, and he never asked to be paid by defendants. Dkt. No. 13 at ¶¶ 6-10, 13. In order to become an NFLPA Contract Adviser, Hiller agreed to be bound by the NFLPA Regulations and signed a contract with the NFLPA. Dkt. No. 13 Ex. A and Ex. B. Hiller signed the contract between himself and the NFLPA "in an effort to position himself to later branch out on his own as a sports agent." Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Declaratory Judgment at 2. Hiller paid for his own NFLPA licensing fees, dues and insurance. Dkt. No. 13 at ¶ 9. At the time that Hiller voluntarily entered into the agreement with the NFLPA requiring him to arbitrate this dispute with defendants, he had an undergraduate degree from the University of Michigan and a graduate degree from Baruch College. Dkt. No. 1 (Complaint) at ¶¶ 29-30.

ARGUMENT

I. WHETHER OR NOT HILLER WAS AN EMPLOYEE AND THE APPLICABILITY OF THE NFLPA LIMITATIONS PERIOD ARE ISSUES FOR THE ARBITRATOR TO DECIDE; THEREFORE, PLAINTIFF'S DECLARATORY JUDGMENT MOTION SEEKS AN IMPERMISSIBLE ADVISORY OPINION.

Hiller moves for a declaratory judgment that the six month limitations period contained in the NFLPA is unenforceable as a matter of law because it precludes the enforcement of his statutory rights as an employee. But he was not an employee. At best, he was an unpaid intern for a couple of summers. His claim to be an employee raises a question fact that must be decided by the arbitrator. If, as seems very probable even from the facts alleged by Hiller in his complaint, he was NEVER an employee of Schwartz and Feinsod, Hiller's has no statutory rights and there is no basis at all for his declaratory judgment claim.

Furthermore, the rule in this circuit is that it is up the arbitrator, not the court, to determine the applicability of time-bar defenses, whether they are based on statute or on the arbitration agreement. *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 121 (2nd Cir. 1991). The six month limitations period in the NFLPA Regulations applies to disputes under Sections 5(A)(2), (A)(3), (A)(4) and A(5) of the Regulations. Defendants have moved to compel arbitration of Hiller's claims because they fall under Sections 5(A)(3), 5(A)(4), and **5(A)(6)** of the Regulations. Memorandum Of Law In Support Of

Defendants' Motion To Compel Arbitration And For A Stay, Dkt. No. 11, at p. 5. Section 5(A)(6) of the Regulations applies to

> (6) A dispute between two or more Contract Advisors with respect to their individual entitlement to fees owed, whether paid or unpaid, by a player-client who was jointly represented by such Contract Advisors, or represented by a firm with which the Contract Advisors in question were associated.

Dkt. No. 13, Ex. B at p. 13. There is no question that Hiller is asserting in this action an entitlement to a fee owed by a player-client who was jointly represented by Hiller and Schwartz, Dkt. No. 1 (Complaint), at ¶¶ 40, 41, and that Section 5(A)(6) applies to that claim.

In the first instance, it is for the arbitrator to decide whether or not Hiller was ever an employee at all or whether, in fact, Hiller's claims fall under Sections 5(A)(3) or 5(A)(4) of the Regulations, which are subject to the limitations period, or Section 5(A)(6) of the Regulations, which apparently is not subject to the limitations period. In light of those uncertainties – all of which are issues to be resolved by the arbitrator in the first instance – the instant motion seeks an advisory opinion and, therefore, the motion should be denied. *Penguin Books USA, Inc. v. Walsh*, 929 F.2d 69 (2nd Cir. 1991).

II. HILLER'S REQUEST FOR A DECLARATORY JUDGMENT MUST BE DENIED BECAUSE HILLER HAS FAILED TO JOIN A NECESSARY PARTY.

The time limitation that Hiller seeks to invalidate via his declaratory judgment motion is contained in an agreement between Hiller and NFLPA; it is not part of an agreement between Hiller and the defendants. The time limitation applies to the claims of every NFLPA certified Contract Adviser. Obviously, a declaration by this court that

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the time limitation in the NFLPA Regulations renders all or part of the arbitration agreement between the NFLPA and every certified Contract Advisor invalid and unenforceable would have a dramatic impact on the NFLPA extending far beyond the boundaries of this particular dispute. As such, the NFLPA is a necessary party without which this court cannot render a decision on the validity or enforceability of the NFLPA Regulations. FRCP Rule 19(a) (an absent person is a necessary party where "(2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest. . . .")

Furthermore, defendants Schwartz and Feinsod have signed the same contract with the NFLPA that Hiller has signed and they are, consequently, subject to the same limitations period that Hiller now contests. Schwartz and Feinsod "represent many high profile NFL players," Dkt. No. 1 (Complaint) at ¶ 22, and their relationships with those players, and with hundreds of other contract advisers, are subject to the NFLPA Regulations and the limitations period contained in the Regulations. Should this court grant Hiller the relief he seeks in his motion for a declaratory judgment, Schwartz and Feinsod would be subject to a substantial risk of inconsistent obligations as a result of a limitations period that applies to claims they might assert but does not apply to claims asserted against them. FRCP Rule 19(a) (an absent person is a necessary party where "the disposition of the action in the person's absence may . . .(ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.")

Furthermore, the NFLPA is an indispensable party under Rule 19(b) because, as noted above, a declaratory judgment relieving Hiller of the time limitation while leaving Schwartz and Feinsod subject to that same limitation would be prejudicial to Schwartz and Feinsod, that prejudice cannot be lessened or avoided by shaping the relief sought, and Hiller has an adequate remedy if his declaratory judgment claim is dismissed for non-joinder because he can make the same arguments in the arbitral forum before an arbitrator who has the power to fashion a suitable equitable remedy. FRCP Rule 19(b). Therefore, plaintiff's request for a declaratory judgment should be denied. *See Mattera v. Clear Channel Communications, Inc.*, 239 F.R.D. 70 (S.D.N.Y. 2006)(dismissing claim for violation of New York Labor Law where former employee failed to join the party that actually set the policy to which plaintiff objected).

III. THE LIMITATIONS PERIOD CONTAINED IN THE NFLPA REGULATIONS IS NOT UNCONSCIONABLE BECAUSE IT WAS NOT IMPOSED BY DEFENDANTS.

The cases cited by Hiller in support of his application for a declaratory judgment have one thing in common: the party allegedly prejudiced by the time limitation included in an arbitration agreement has sued the contracting party that imposed the time limitation. Whatever may be the particular articulation of each court's decision, in each case cited by plaintiff the court has prohibited a dominant party from unfairly benefiting from a contractual time limitation that it unfairly has imposed by contract on a weaker party. Here, by contrast, Hiller seeks to avoid the consequences of a time limitation in an agreement that Schwartz and Feinsod did not draft, did not propose to Hiller, and did not enter into for the purpose of bringing advantage to themselves at Hiller's expense.

Whatever may be the "fairness" of the time limitation in the NFLPA Regulations, it impacts Schwartz and Feinsod just as surely as it impacts Hiller and cuts off their rights just as certainly as it cuts off his. Under these circumstances, the reasoning of the cases cited by Hiller is not compelling.

> A contract or clause is unconscionable when there is an "absence of meaningful choice on the part of one of the parties together with contract terms which are **unreasonably favorable to the other party**." 8 Samuel Williston, A Treatise on the Law of Contracts, § 18:9, at 54 (Richard A. Lord ed., 4th ed. 1998); see *Seus* [*v. John Nuveen & Co.*, 146 F.3d 175, 184 (3d Cir. 1998), *cert. denied*, 525 U.S. 1139, 119 S.Ct. 1028, 143 L.Ed.2d 38 (1999)] (same); *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 249 (2d Cir. 1991) (purpose of unconscionability doctrine is to prevent unfair surprise and undue oppression); *see also Rust v. Drexel Firestone Inc.*, 352 F. Supp. 715, 717 (S.D.N.Y. 1972) (discussing element of duress).

Desiderio v. National Ass'n of Securities Dealers, Inc., 191 F.3d 198, 207 (1999)(holding that an arbitration provision applicable to both parties was not unconscionable).

IV. SHOULD THE COURT DETERMINE THAT THE NFLPA LIMITATIONS PERIOD TO WHICH HILLER VOLUNTARILY SUBMITTED IS UNCONSCIONABLE, THE LIMITATION PERIOD SHOULD BE SEVERED FROM THE ARBITRATION AGREEMENT AND HILLER SHOULD BE COMPELLED TO ARBITRATE HIS CLAIMS.

Ragone v. Atlantic Video at Manhattan Center, 595 F.3d 115 (2010), cited by Hiller, clearly holds that should this court determine that the limitations period in the NFLPA Regulations is unconscionable under the circumstances presented, it should sever the time limitation and enforce the remaining terms of the arbitration agreement.

> [W]e hold that *Brower*[1] and *Schreiber*[2] call for affirmance of the district court. *Schreiber* directs that "the appropriate remedy" when a court is faced with a plainly unconscionable provision of an arbitration agreement—one which by itself would actually preclude a plaintiff from pursuing her statutory rights—"is to sever the improper provision of the arbitration agreement, rather than void the entire agreement."

Id. at 124-25.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court deny plaintiff's motion for a declaratory judgment and grant their pending motion to compel arbitration of plaintiff's claims against defendants in accordance with the express terms of the NFLPA Regulations. Alternatively, the Court should sever that part of the Regulations imposing a six month time limitation on plaintiff's claims and should compel arbitration pursuant to the remaining terms of the Regulations.

Dated: New York, New York
October 28, 2016

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by ______________________
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[1] *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 676 N.Y.S.2d 569 (1st Dep't 1998).

[2] *Schreiber v. K–Sea Transportation Corp.*, 9 N.Y.3d 331, 849 N.Y.S.2d 194, 879 N.E.2d 733 (2007).